

**BEFORE THE DEBTS RECOVERY**  
**APPELLATE TRIBUNAL, AT: MUMBAI**

**Present: Mr Justice Ashok Menon, Chairperson**

**I.A. No. 703/2023(WoD)**

**In**

**Appeal on Diary No. 1876/2023**

**Between**

M/s India Steel Works Ltd. & Ors. ... Appellant/s

V/s.

Kotak Mahindra Bank Ltd. ... Respondent/s

Mr Rishabh Shah along with Ms Ragini Singh, i/b M/s Ragini Singh & Associates, Advocate for Appellants.

Mr Rohit Gupta, along with Mr Vinay Deshpande, i/b M/s V. Deshpande & Co., Ad, Advocate for Respondent Bank.

**:- Order dated: 08/11/2023:-**

The Appellants are in appeal impugning the order dated 05/10/2023 in I.A. No. 2953 of 2023 in Securitisation Application (S.A.) No. 136 of 2023 on the files of the Debts Recovery Tribunal-I, Mumbai (D.R.T.) in dismissing the application seeking to restrain the Respondent bank from taking physical possession of the secured assets under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short). In order to entertain the appeal, the Appellants need to comply with the mandatory provision of making a pre-deposit as contemplated under section 18 (1) of the SARFAESI Act. I.A. No. 703/2023 is filed by the Appellants seeking a waiver of the mandatory pre-deposit for the reasons stated in the application.

2. The Appellants had challenged the Sarfaesi measures under section 17 of the SARFAESI Act raising various contentions which

include the contention that the classification of the debt as a non-performing asset (NPA) is mentioned in the demand notice under section 13 (2) of the SARFAESI Act is mentioned as 13/11/2020 whereas, in the application filed before the NCLT, the said date is mentioned as 21/07/2021. It is also contended that the Appellants had availed loan from the DNS Bank mortgaging the very same properties and that the said bank has a pari passu charge over the assets. The Appellants would also contend that their factory was completely destroyed in a fire accident that took place in 2019 followed by a cyclone in 2020 and thereafter the functioning of the factory was affected due to the national lockdown following the COVID-19 pandemic. The possession notice issued under section 13 (4) issued by the Respondent is also challenged. It is also contended that the Appellants had made several payments towards the debt reducing the liability. The Respondent had sanctioned an additional facility in the form of WCTL under the Emergency Credit Line Guarantee Scheme (ECLGS) of ₹80 lakhs. The Respondent is in breach of 1 of the conditions mentioned in the sanction letter which states that the amount disbursed under ECLGS shall not be utilised for repayment of any other loan or obligation due to the bank or to any other lending institution. The Appellants, therefore, seek a complete waiver of mandatory pre-deposit.

3. The Respondent bank has filed an affidavit of reply vehemently opposing the application for waiver stating that a complete waiver of the mandatory pre-deposit is not contemplated. The Appellants had vide letter dated 28/11/2020 admitted committing default of

repayment of the outstanding dues and had requested for rescheduling/restructuring of the existing credit facilities. The Appellant had thereafter, in a letter dated 10/02/2022 reiterated admission of committing default and had offered to pay the principal amount of ₹11.09 crores. The Appellants had further sought a month moratorium on the principal amount and offered to repay the outstanding dues in 2 years by way of equated monthly instalments. The Appellants had offered to pay an upfront amount of ₹2 crores on the date of signing and execution of the consent terms in the applications pending before the NCLT Mumbai. The Respondent had however rejected the proposal considering the value of the secured assets. The Appellants had once again come up with a proposal for settlement vide letter dated 31/08/2023 offering to pay an amount of ₹13.50 crores with 10% upfront payment within 2 weeks and the balance of 90% within 90 days from the acceptance of the settlement offer. The settlement offer was however rejected by the Respondent vide letter dated 13/09/2023. Consequent to the decline of granting any protection to the Appellants by the impugned order, the Respondent proceeded to take physical possession of the secured assets. The other creditor namely DNS Bank had also taken measures under the provisions of the SARFAESI Act by issuing the demand notice under section 13 (2). From the notices issued by the Respondent and the DNS Bank, it is clear that the measures are taken with the mutual approval and sanction of the banks. By letter dated 07/10/2022 the Respondent had sought the consent of the DNS Bank for taking possession of the secured assets under the provisions of

section 13 (9) of the SARFAESI Act and the DNS Bank had, vide letter dated 07/11/2022 given consent of the Respondent to initiate action under the SARFAESI Act. Apparently, the consent given by the DNS Bank to the Respondent is for recovering the entire dues of the DNS Bank and to share the same in proportion. The Appellants are therefore to be directed to deposit 50% of the amounts due to the secured creditors including the DNS Bank. The outstanding dues that are payable by the Appellant as of 06/10/2023 to the Respondent are ₹ 22,21,91,168.82 and the amount outstanding to be paid to the DNS Bank as of 30/09/2023 is ₹33,78,31,000/-. The aggregate amount to be recovered from the Appellants would be ₹56,00,22,168/-the Appellants may be directed to pay 50% of the said amount, submits the Respondent.

4. The Ld. Counsel appearing for the Appellant Mr Rishabh Shah submits that the Appellants have suffered due to the calamities and there are no business activities taking place. Under the circumstances, indulgence may be shown to reduce the mandatory pre-deposit to a minimum of 25% of the debt due. It is also stated that the Appellants have a good prima facie case to maintain the challenge under section 17 of the SARFAESI Act. The demand notice under section 13 (2) dated 04/08/2021 demands a sum of ₹ 13,77,85,111/- as of 30/05/2021. Mr Shah would therefore argue that the Appellants may be permitted to deposit 25% of the said amount for entertaining the appeal.

5. Per contra, Mr Rohit Gupta appearing for the Respondent submits that the Appellants will have to deposit 50% of the total

amount due from the secured creditors including the Respondent and the DNS Bank. The Ld. Counsel relies on the decision of the Hon'ble High Court of Judicature at Bombay in *Shree Vindhya Paper Mills Ltd. vs. Stressed Assets Stabilisation Fund & Ors Writ Petition No. 9073 of 2011* referring to section 18 (1) of the SARFAESI Act it was held that the law requires the borrower to deposit 50% of the debt as claimed by the secured creditors. The use of the plural expression "secured creditors" is indicative of the fact that what is required to be deposited is 50% of the entire debt due to all the secured creditors cumulatively.

6. There is no doubt that the 2<sup>nd</sup> proviso to section 18 (1) of the SARFAESI Act states that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. It is true that the Respondent had in compliance with the provisions under section 13 (9) of the SARFAESI Act obtained consent from the DNS Bank to proceed against the secured assets and the DNS Bank had consented to the Sarfaesi action initiated by the Respondent. In the letter dated 17/11/2022, the DNS Bank had observed thus:

"While our bank had already issued demand notice under section 13 (2) of the SARFAESI 2002 on 07/07/2022 we hereby accord our consent to your find bank to initiate action under the SARFAESI Act 2002.

Please note that this concern the subject to condition that any recovery that your find bank will make due to action initiated under SARFAESI should be shared in proportion of exposure of our two banks."(sic)

7. The amount borrowed by the Appellants is not from a consortium of banks. Two separate facilities were availed from the

aforementioned banks. Separate actions for recovery of the debt under the SARFAESI Act were initiated by the banks by showing separate notices under section 13 (2) of the Act. A reading of the consent letter sent by the DNS Bank would only indicate that the recovery made by the Respondent should be shared in proportion by the Banks. In the decision of the Hon'ble Bombay High Court in *Shree Vindhya Paper Mills* (supra) the recovery was being made by the Stressed Assets Stabilisation Fund for the entire debt due to all the secured creditors cumulatively which was ₹250.50 crores and the DRAT had directed deposit of 30% of the said amount. In the instant case, the Respondent had demanded only a sum of ₹13,77,85,111/- which was due to it. Hence, for the purpose of making the pre-deposit contemplated under section 18 (1) of the SARFAESI Act, the aforesaid amount is to be taken as the threshold for calculating the pre-deposit.

8. The Appellants have contended that they are under financial strain because of the calamities they had to face in the form of a fire accident, cyclone and the pandemic. There is however no evidence regarding the financial capabilities of the directors of the company who are the guarantors. The Appellants are therefore directed to deposit a sum of ₹5 crores as pre-deposit for entertaining the appeal. The Appellants had already produced a demand draft for ₹25 lakhs on 19/10/2023. The balance amount of ₹ 4.75 crores shall be paid in two instalments within a gap of three weeks each as herein under:

<b><u>Numbers of Instalments</u></b>	<b><u>Payment on or before</u></b>
1 <sup>st</sup> Instalment ₹ 2,50,00,000/-	29.11.2023
2 <sup>nd</sup> Instalment ₹2,25,00,000/-	20.12.2023

9. Default in payment of any of the instalments entails in dismissal of the appeal without any further reference to this Tribunal.
10. In view of the payment of ₹ 25 lakhs, there shall be a stay of the further Sarfaesi measures until the next date of hearing.
11. The amount shall be deposited in the form of a Demand Draft with the Registrar of this Tribunal.
12. As and when the said amounts are deposited, they shall be invested in term deposits in the name of Registrar, DRAT, Mumbai, with any nationalised bank, initially for 13 months, and thereafter to be renewed periodically.
13. With these observations, the I.A. is disposed of. The Respondent is at liberty to file a reply in the Appeal with an advance copy to the other side.
- Post on 30.11.2023 for reporting compliance regarding the first instalment.

Sd/-  
Chairperson

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